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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1950

No. 583

WHEATON BRASS WORKS, a corporation of the State of New Jersey,

Petitioner,

against

SOUTHERN PACIFIC COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS

PAGE

Grounds of Jurisdiction 1

The Facts 2

Question Presented 3

Argument 3

POINTS:

I. Liability for freight charges on an interstate shipment is governed solely by the uniform bill of lading and by federal law, *i. e.*, the Interstate Commerce Act, which exclusively occupies the field 3

II. Section 6(7) of the Interstate Commerce Act, which forbids discrimination or preferences by rail carriers, compels them to collect the full lawfully filed tariff charges on interstate shipments from a person liable therefor 5

III. The carrier is under no obligation to proceed first against the consignor since the consignee is primarily liable for the charges 8

IV. The decision of the New Jersey Supreme Court is in accord with the applicable decisions of this Court and the question decided has previously been determined by this Court 9

Conclusion 15

Table of Cases

PAGE

Atchison, Topeka & Santa Fe Ry. Co. v. Hunt Bros., 34 Fed. (2d) 582 (D. C. W. D. Mo., 1929) 8

Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, 233 U. S. 173 (1914) 7

Boston & Maine R. R. v. Hannaford Bros. Co., 68 A. (2d) 1 (1949) 8, 11

F. Burkhart Mfg. Co. v. Fort Worth & D. C. Ry. Co., 149 Fed. (2d) 909 (C. C. A. 8, 1945) 11, 14

Central Warehouse Co. v. Chicago, R. I. & P. Ry. Co., 14 Fed. (2d) 123 (D. C. Minn.), aff'd 20 Fed. (2d) 828 (C. C. A. 8, 1927) 11, 14

Chicago & N. W. Ry. Co. v. Case Plow Works, 173 Wis. 237, 180 N. W. 846 (1921) 12

Great Northern Ry. Co. v. Hyder, 279 Fed. 783 (D. C. W. D. Wash. S. D., 1922) 11

Gulf, Colorado & Santa Fe Ry. Co. v. Hefley, 158 U. S. 98 (1895) 5

Houston & T. C. R. Co. v. Johnson, 41 S. W. (2d) 14 (1931) 11

Illinois Steel Co. v. Baltimore & Ohio R. Co., 320 U. S. 508 (1944) 4, 11, 13, 14

In the Matter of Bills of Lading, 52 I. C. C. 671 (1919); 64 I. C. C. 357 (1921) 2, 4

Long Island R. Co. v. Midland Valley Lumber Co., 237 Mo. App. 147, 164 S. W. (2d) 930 (1942), (Rehearing Denied) 8

Louisville & Nashville R. R. Co. v. Central Iron & Coal Co., 265 U. S. 59 (1924) 4, 6, 11, 13, 14

PAGE

Louisville & Nashville R. R. Co. v. Maxwell, 237 U. S. 94 (1915) 7

Louisville & Nashville R. R. Co. v. United States, 267 U. S. 395 (1925) 14

Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U. S. 516 (1939), (Rehearing Denied) 12

New York Central R. Co. v. Federal Sugar Refining Co., 235 N. Y. 182, 139 N. E. 229 (1923) 8

New York Central R. R. Co. v. Stanzeale, 105 N. J. L. 593, 147 A. 457 (1929) 12

N. Y. N. H. & H. R. Co. v. Lord & Spencer, 273 Mass. 583, 174 N. E. 179 (1931) 12

Norfolk & Western Ry. Co. v. Williamson Grocery Co., 103 W. Va. 532, 138 S. E. 102 (1927) 12

Pennsylvania R. R. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857 (1915) 9, 12

Pittsburgh, C. C. & St. L. R. Co. v. Fink, 250 U. S. 577 (1919) 3, 4, 6, 7, 9, 11, 12

Texas & Pacific Railway Co. v. Mugg, 202 U. S. 242 (1906) 7

Western & Atlantic R. Co. v. Underwood, 281 Fed. 891 (D. C. N. D. Ga., 1922) 8, 11

York & Whitney v. New York Central & H. R. R. Co., 256 U. S. 406 (1921) 4, 6, 7, 9, 11

Statutes Cited

Title, 49, U. S. C. A., Secs. 1-27 1

Title 49, U. S. C. A., Sec. 6(7) 2, 5, 6

Title 28, U. S. C. A., Sec. 1257(3) 1

Title 28, U. S. C. A., Sec. 2101(c) 1

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SOUTHERN PACIFIC COMPANY,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Southern Pacific Company, submits the following brief in opposition to the petition for writ of certiorari heretofore filed in this Court.

Grounds of Jurisdiction.

Petitioner invokes the jurisdiction of this Court under Title 28, U. S. C. A., Secs. 1257(3) and 2101(c). The right of the respondent rail carrier under the Interstate Commerce Act [1] to collect from the consignee filed tariff charges on an interstate shipment accepted by the consignee was sustained below by the Supreme Court of New Jersey.

[1] Title 49, U. S. C. A., Secs. 1-27.

Petitioner's claim seems to be that a New Jersey common law rule, providing that a consignee accepting delivery of a shipment is not liable for freight charges where the cerrier advises it that the charges have been paid, should relieve the petitioner from liability for the charges sued for below, despite the requirements of the bill of lading and of Sec. 6(7) of the Interstate Commerce Act. The bill of lading specifically makes the consignee liable for the filed tariff charges. Sec. 6(7) of the Interstate Commerce Act provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation * * * than the rates * * * specified in the tariff filed and in effect at the time".

Respondent submits that this Court should decline to exercise its discretion to review the judgment below, since the decision sought to be reviewed (a) is clearly in accord with the applicable decisions of this Court and (b) decides no questions not heretofore determined by this Court.

The Facts.

Petitioner's statement of the facts is substantially correct[2] and will not be repeated herein. However, respondent points out that the "uniform straight bill of lading" (R. 8A) approved by the Interstate Commerce Commission,[3] under which the shipment moved, contained the following clause (R. 9):

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property * * *."

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[2] Petition, pages 4-8.

[3] In the Matter of Bills of Lading, 52 I. C. C. 671; 64 I. C. C. 357.

Question Presented.

Whether the consignee who accepts delivery of an interstate shipment with knowledge that it actually consisted of iron, steel and brass, is liable for the difference between the filed tariff rate for such goods and the lower rate for iron and steel only, the shipment having been misdescribed by the shipper in the bill of lading as iron and steel, and prepaid at the lower erroneous rate, where the consignee had refused to accept the shipment until assured that the freight had been prepaid and had changed his position in reliance on such representation.

Argument.

The argument will be addressed to the question of whether the case presented by the record is one in which this Court should exercise its discretionary power to grant a writ of certiorari. Respondent's position is that the Supreme Court of New Jersey decided the case below in accordance with this Court's decision in *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577, which is controlling on the facts involved herein.

POINT I.

Liability for freight charges on an interstate shipment is governed solely by the uniform bill of lading and by federal law, *i. e.*, the Interstate Commerce Act, which exclusively occupies the field.

Petitioner's contention that a local common law rule operates to relieve a consignee accepting a shipment from liability for the tariff charges despite the bill of lading provision cannot be sustained. This Court has consistently

held that the obligations imposed by the Interstate Commerce Act on all common carriers engaged in interstate commerce to collect the lawful tariff charges, and on the consignors, consignees and owners of interstate shipments to pay such charges, must prevail over conflicting rules of common law or of state statute.

> *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U. S. 508 (1944);
> *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59 (1924);
> *York & Whitney* v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);
> *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577 (1919).

In *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink, supra,* this Court said in regard to the liability of a consignee to pay freight charges on an interstate shipment, of which he had accepted delivery:

> "* * * in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce."

Pursuant to Congressional authority, the Interstate Commerce Commission prescribed uniform forms of bills of lading, including that involved in this case, and has held that the prescribed forms are reasonable.

> *In the Matter of Bills of Lading*, 52 I. C. C. 671 (1919); 64 I. C. C. 357 (1921).

This Court recently stated in *Illinois Steel Co.* v. *Baltimore & Ohio R. Co., supra:*

> "Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate ship-

ment and are prescribed by Congress and the Commission in the exercise of the commerce power, they have the force of federal law and questions as to their meaning arise under the laws and Constitution of the United States."

The field is thus completely occupied by federal law to the exclusion of any claimed state statutes or common law rules. Any decisions applying state law are thus entirely inapplicable to any question of the collectibility of charges on an interstate shipment.

Gulf, Colorado & Santa Fe Ry. Co. v. *Hefley*, 158 U. S. 98 (1895).

POINT II.

Section 6(7) of the Interstate Commerce Act, which forbids discrimination or preferences by rail carriers, compels them to collect the full lawfully filed tariff charges on interstate shipments from a person liable therefor.

It may be thought a hardship to sustain the collection of the unpaid tariff charges from the consignee here who accepted the shipment with the carrier's assurance that the charges had been prepaid. But individual cases of hardship must bow to the paramount purpose of the law.

In order to eliminate every possible form of discrimination in interstate transportation, Congress has, by Sec. 6(7) of the Interstate Commerce Act,[4] forbidden both intentional as well as unintentional deviations from the predetermined schedule of rates filed with the Interstate Commerce Com-

[4] Title 49, U. S. C. A., 6(7).

mission. The absolute obligation of the carrier to collect and the parties liable therefor to pay the freight charges on an interstate shipment is set forth in this section of the Act:

> "No carrier, * * * shall engage * * * in the transportation of * * * property, * * * unless the rates, * * * and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation* for such transportation of * * * property, * * * between the points named in such tariffs than the rates, * * * and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, * * * and charges so specified, * * *." (Italics ours.)

This Court, in interpreting the effect of Section 6(7), has held that the carrier has a lien for the lawful tariff charge and that the consignee, by the act of accepting the shipment, thereby assumes the obligation of discharging the lien. This Court has often ruled that this obligation on the part of the consignee could not be avoided on the ground that it imposed a hardship on the consignee, or that the consignee had relied upon the erroneous assumption or advice that the charges had been paid and accordingly changed its position to its detriment.

Louisville & N. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59 (1924);

York & Whitney v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);

Pittsburgh, C. C. & St. L. R. Co. v. *Fink*, 250 U. S. 577 (1919).

In *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink,* 250 U. S. 577, this Court, in holding a consignee liable to pay lawful additional filed tariff charges which the carrier had failed to demand at the time of acceptance of the shipment by the consignee, said:

> "This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but *instances of individual hardship cannot change the policy* which Congress has embodied in the statute in order to secure uniformity in charges for transportation." (Italics ours.)

The policy of preventing discrimination which Congress has embodied in the Interstate Commerce Act, has been repeatedly recognized by this Court as of more importance than the hardships resulting in individual cases. Thus, in *Louisville & Nashville R. R. Co.* v. *Maxwell,* 237 U. S. 94 (1915), this Court said:

> "Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Moreover, it has been stated that the liability imposed by the federal law *cannot be contracted away* by the carrier.

> *York & Whitney Co.* v. *New York Central & H. R. Co.* 256 U. S. 406 (1921);
>
> *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson,* 233 U. S. 173 (1914);
>
> *Texas & Pacific Railway Co.* v. *Mugg,* 202 U. S. 242 (1906).

POINT III.

The carrier is under no obligation to proceed first against the consignor since the consignee is primarily liable for the charges.

Petitioner makes the contention that the respondent should have endeavored to collect the unpaid charges here from the shipper instead of the consignee. No authority is given for any such obligation on the carrier, and the cases uniformly hold there is none.

The consignee is primarily liable and the carrier may proceed directly against it if it refuses to pay, without first taking any action against the shipper.

Atchison, Topeka & Santa Fe Ry. Co. v. *Hunt Bros.*, 34 Fed. (2d) 582 (D. C. W. D. Mo., 1929);

Western & Atlantic R. Co. v. *Underwood*, 281 Fed. 891 (D. C. N. D. Ga., 1922);

Boston & Maine R. R. v. *Hannaford Bros. Co.*, 68 A. (2d) 1 (1949);

Long Island R. Co. v. *Midland Valley Lumber Co.*, 237 Mo. App. 147, 164 S. W. (2d) 930 (1942), (Rehearing Denied);

New York Central R. Co. v. *Federal Sugar Refining Co.*, 235 N. Y. 182, 139 N. E. 229 (1923).

The payment of a *part* of the correct, lawful charges by the shipper did not fulfill or release performance by the consignee of his contract. The consignee was charged with full knowledge that the lawful rate was that set forth in the tariffs filed with the Interstate Commerce Commission. Consequently, the consignee is held as a matter of law, to

have agreed, by accepting the goods, to pay the full lawful charges.

York & Whitney v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);
Pittsburgh, C. C. & St. L. R. Co. v. *Fink*, 250 U. S. 577 (1919);
Pennsylvania R. R. Co. v. *Titus*, 216 N. Y. 17, 109 N. E. 857 (1915).

POINT IV.

The decision of the New Jersey Supreme Court is in accord with the applicable decisions of this Court and the question decided has previously been determined by this Court.

Petitioner's contentions that the case was decided below contrary to the reasoning of applicable decisions of this Court, and that this Court has not passed on the question presented below, are without foundation. The instant case was decided below on the theory that there was an absolute duty on the part of the consignee accepting the shipment to pay the full filed tariff charges, irrespective of whether the carrier had erroneously advised the consignee on delivery that the charges had been fully paid. Such decision is not only in accord with the reasoning of, but is on all fours with the prior decisions of this Court.

The fact situation in the case at bar is indistinguishable from that in *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577. In that case the carrier delivered merchandise to the consignee upon the payment by the latter of $15.00, the amount of charges demanded by the carrier. The tariff rates filed with the Interstate Commerce Commission so

classified the merchandise that the lawful charges should have been $30.00. Suit was instituted by the carrier for the difference. Recovery was allowed on the theory that the consignee was presumed to know the filed tariff rate on the commodity shipped and that the filed tariff rate was the only rate which could lawfully be collected. This Court held that the carrier had a lien on the goods for the amount of the lawfully filed tariff charges, which could only be discharged by the payment of such charges. The basis of the decision was stated by Mr. Justice Day at page 581:

> "* * * The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. *For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate.* Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. *This may be in the present as well as some other cases a hardship upon the consignee, due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship can-*

not change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation." (Italics ours.)

It was further pointed out in the *Fink* case that the defendant could not raise the defense of estoppel by reason of the failure of the carrier to demand the correct charges at the time of delivery, as "Estoppel could not become the means of successfully avoiding the requirement of the Act as to legal rates in violation of the provisions of the statute."

The principle fixing the liability of the consignee, as established in the *Fink* case, has been consistently followed by this Court and by numerous state and lower federal courts.

Illinois Steel Co. v. *Baltimore & Ohio R. Co.*, 320 U. S. 508 (1944);

Louisville & N. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59 (1924);

York & Whitney v. *New York Central & H. R. R. Co.*, 256 U. S. 406 (1921);

F. Burkhart Mfg. Co. v. *Fort Worth & D. C. Ry. Co.*, 149 Fed. (2d) 909 (C. C. A. 8, 1945);

Central Warehouse Co. v. *Chicago, R. I. & P. Ry. Co.*, 14 Fed. (2d) 123 (D. C. Minn.), aff'd 20 Fed. (2d) 828 (C. C. A. 8, 1927);

Western & Atlantic R. Co. v. *Underwood*, 281 Fed. 891 (D. C. N. D. Ga., 1922);

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Boston & Maine R. R. Co. v. *Hannaford Bros. Co.*, 68 A. (2d) 1 (1949);

Houston & T. C. R. Co. v. *Johnson*, 41 S. W. (2d) 14 (1931);

N. Y. N. H. & H. R. Co. v. *Lord & Spencer,* 273 Mass. 583, 174 N. E. 179 (1931);
New York Central R. R. Co. v. *Stanzeale,* 105 N. J. L. 593, 147 A. 457 (1929);
Norfolk & Western Ry. Co. v. *Williamson Grocery Co.,* 103 W. Va. 532, 138 S. E. 102 (1927);
Chicago & N. W. Ry. Co. v. *Case Plow Works,* 173 Wis. 237, 180 N. W. 846 (1921);
Pennsylvania R. R. Co. v. *Titus,* 216 N. Y. 17, 109 N. E. 857 (1915).

The rule governing the *Fink* case and the case at bar was recognized in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U. S. 516 (1939), rehearing denied:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates."

The petitioner contends that its liability must be predicated on a contract with the carrier to pay the shipping charges. Petitioner says that in the present case it had informed the carrier, prior to its acceptance of the goods, that the shipping charges were supposed to have been paid by the shipper and that it, the consignee, would not assume liability therefor. It says that thus there was no contract by the consignee to pay the charges and hence no liability on its part. The *Fink* case, however, is clear authority that no contract is required to charge the consignee with liability for the correct charges.

It may be argued that the *Fink* case differs from the case at bar in that in the former case there was merely a mutual

mistake as to the correct charges, whereas in the present case there was a definite agreement by the carrier not to collect any additional charges. However, under the reasoning of the *Fink* case and of *Illinois Steel Co.* v. *Baltimore & Ohio R. Co.*, 320 U. S. 508, the carrier *could not legally agree* not to collect any unpaid tariff charges from the consignee. It could not estop itself from collecting from the consignee the charges that were lawfully owing on the shipment and which it had not collected because of the consignor's misdescription of the goods, nor could the carrier be deprived of its lien by making delivery of the shipment.

The case of *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, on which petitioner's main reliance seems to be based, does not in any way support its position. That case involved a suit by a carrier against a coal company, which had delivered coal to the carrier for shipment, for the difference between the amount of charges originally incorrectly computed and paid by the consignee and the proper amount which was legally payable. The bill of lading in that case, as here, stated that the charges should be paid by the owner or the consignee. The Court considered the bill of lading as the contract and decided that the *shipper, i. e.*, the coal company, which had merely delivered the coal for shipment and had *not signed the bill of lading* and was *not the consignor or owner or the party for whose benefit the shipment was made*, was not liable for the unpaid charges. Mr. Justice BRANDEIS, speaking for the Court, said that the Interstate Commerce Act did not impose an absolute obligation upon a *shipper* to pay the freight charges, and that the carrier and *shipper* "were left free to contract, subject to the rule which prohibits discrimination". But in concluding his opinion, Mr. Justice BRANDEIS pointed out that this *did not relieve the consignee*

from full liability for the charges on a shipment accepted by him:

> "For, under the rule of the Fink case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, *whether they are demanded at the time of delivery, or not until later.* His liability satisfies the requirements of the Interstate Commerce Act." (Italics ours.)

The rule of the foregoing case appears to be that while the shipper has, under the form of the bill of lading therein, some latitude in limiting his liability by his contractual undertaking, nevertheless, "if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges". The *Central Iron & Coal Co.* case has been subsequently construed by this Court and the lower federal courts to impose an absolute liability on the consignee resulting from the acceptance of the goods.

Illinois Steel Co. v. *Baltimore & Ohio R. Co.*, 320 U. S. 508 (1944);

Louisville & Nashville R. R. v. *United States*, 267 U. S. 395 (1925);

F. Burkhart Mfg. Co. v. *Fort Worth & D. C. Ry. Co.*, 149 Fed. (2d) 909 (C. C. A. 8, 1945);

Central Warehouse Co. v. *Chicago, R. I. & P. Ry. Co.*, 14 Fed. (2d) 123 (D. C. Minn.), aff'd 20 Fed. (2d) 828 (C. C. A. 8, 1927).

Conclusion.

In conclusion, it is submitted that this application for a writ of certiorari should be denied as the decision of the New Jersey Supreme Court is in accord with the federal statute and with the applicable decisions of this Court on a question previously decided by this Court.

Respectfully submitted,

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